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No. 87-994

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

GENERAL MOTORS CORPORATION and
AMERICAN NATIONAL RED CROSS,
Petitioners,

v.

WILLIAM M. BENNETT, CONWAY H. COLLIS,
ERNEST J. DRONENBURG, JR., RICHARD NEVINS,
GRAY DAVIS, and BRUCE BUNNER,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF AMICI CURIAE FOR AMERICAN COUNCIL OF LIFE INSURANCE AND HEALTH INSURANCE ASSOCIATION OF AMERICA IN SUPPORT OF THE PETITION

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QUESTIONS PRESENTED

1. Whether a state tax that "relates to" an employee benefit plan under § 514(a) of the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. § 1144 (a), by explicitly including the plan's benefit payments in the amounts subject to tax is saved from preemption as a law which "regulates insurance" under ERISA § 514 (b) (2) (A) because the legal incidence of the tax is on insurance companies?

2. Whether such a state tax deems ERISA plans "to be engaged in the business of insurance" in violation of § 514(b) (2) (B) of ERISA, 29 U.S.C. § 1144(b) (2) (B), because it treats the benefits paid by such plans as a taxable cost of "insurance", regardless of the extent of insurance actually purchased by the plans?

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BRIEF AMICI CURIAE FOR AMERICAN COUNCIL OF LIFE INSURANCE AND HEALTH INSURANCE ASSOCIATION OF AMERICA IN SUPPORT OF THE PETITION

This brief is filed on behalf of the American Council of Life Insurance ("Council") and the Health Insurance Association of America ("HIAA"), as amici curiae, in support of the petition for certiorari.[1]

INTERESTS OF THE AMICI

The Council is the largest life insurance trade association in the United States, representing the interests of

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[1] Consent from counsel for both parties has been filed with the Clerk of this Court.

645 member life insurance companies. The Council's members, which include most of the country's major life insurers, currently hold ninety-five percent of the life insurance in force in legal reserve life insurance companies in the United States. The HIAA represents the interests of 345 member companies, which provide approximately ninety percent of the health insurance written by commercial insurance companies in the United States. The combined memberships of the HIAA and the Council represent over ninety percent of such health insurance.

The insurance industry plays a critical role in providing welfare benefits to members of the nation's workforce through benefit plans governed by the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. §§ 1001 *et seq.* As of 1979, insurance companies —including many members of the Council and the HIAA —funded through group policies approximately 99 percent of the benefit plans in the United States which covered fewer than 100 participants. *See* "Employee Welfare Benefit Plans and Plan Sponsors in the Private Nonfarm Sector in the United States, 1978-79," Health and Population Study Center, Battelle Human Affairs Research Centers, Vol. IV (1980), at 43-45. Approximately 92 percent of the plans in this country covering greater than 100 participants were also funded in this way. *Id.* In many instances, insurers assume administrative responsibilities for insured, partially-insured and self-insured plans. *Id.* Thus, members of the Council and the HIAA make welfare benefit plans possible for countless employers—large and small—thereby ensuring that the great mass of workers in this country receive some form of life and health insurance protection.

The legal and practical consequences of the Ninth Circuit's opinion below are matters of grave concern to the members of the Council and the HIAA. That decision—that ERISA does not preempt a state premium tax assessed indirectly against the self-funded benefits of an

employee benefit plan simply because the plan purchases excess-risk insurance—greatly limits the funding choices available to employers who voluntarily establish those plans and penalizes ERISA plans partially funded by employers. If the decision below stands, employers who bear all of the risk of paying the uninsured benefits of such plans will be subjected to the cost resulting from the tax on those benefits merely because they purchase excess-risk insurance.

STATUTES INVOLVED

1. Section 514(a) of ERISA provides, in pertinent part, that:

> Except as provided in subsection (b) of this section, the provisions of this subchapter and subchapter III of this chapter shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in section 1003 (a) of this title and not exempt under section 1003 (b) of this title.

29 U.S.C. § 1144(a).

2. Section 514(b) of ERISA provides, in pertinent part, that:

> (2)(A) Except as provided in subparagraph (B), nothing in this subchapter shall be construed to exempt or relieve any person from any law of any State which regulates insurance, banking, or securities.
>
> [(2)](B) Neither an employee benefit plan described in section 1003(a) of this title, which is not exempt under section 1003(b) of this title . . . nor any trust established under such a plan, shall be deemed to be an insurance company or other insurer . . . or to be engaged in the business of insurance . . . for purposes of any law of any State purporting to regulate insurance companies, [or] insurance contracts. . . .
>
> * * * *

(5)(A) Except as provided in subparagraph (B), subsection (a) of this section shall not apply to the Hawaii Prepaid Health Care Act (Haw. Rev. Stat. §§ 393-1 through 393-51).

[(5)](B) Nothing in subparagraph (A) shall be construed to exempt from subsection (a) of this section—

(i) any State tax law relating to employee benefit plans . . . .

29 U.S.C. § 1144(b).

3. Section 514(c) of ERISA provides, in pertinent part, that:

(1) The term "State law" includes all laws, decisions, rules, regulations, or other State action having the effect of law, of any State. . . .

(2) The term "State" includes a State, any political subdivisions thereof, or any agency or instrumentality of either, which purports to regulate, directly or indirectly, the terms and conditions of employee benefit plans covered by this subchapter.

29 U.S.C. § 1144(c).

4. The McCarran-Ferguson Act provides, in relevant part, that:

[1011.] Congress declares that the continued regulation and taxation by the several States of the business of insurance is in the public interest, and that silence on the part of the Congress shall not be construed to impose any barrier to the regulation or taxation of such business by the several States.

[1012.] (a) The business of insurance, and every person engaged therein, shall be subject to the laws of the several States which relate to the regulation or taxation of such business.

(b) No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business

> of insurance, or which imposes a fee or tax upon such business, unless such Act specifically relates to the business of insurance. . . .

15 U.S.C. §§ 1011-1012.

STATEMENT

General Motors Corporation ("GMC") and the American National Red Cross ("Red Cross") sponsor ERISA-covered plans which provide disability and health care benefits to employees. They fund the plans with company assets and "excess-risk" policies purchased from Metropolitan Life Insurance Company ("Metropolitan"). Under this funding arrangement, GMC and Red Cross bear the risk of paying, out of their own funds, all claims up to a specified level, i.e., the so-called "trigger point". Metropolitan pays all claims above the trigger point.

The State of California taxes "gross premiums . . . received" by insurance companies that do business in the State. Cal. Rev. & Tax Code § 12221 (West 1970 & 1987 Supp.). "Gross premiums" include, as a matter of judicial construction, "the entire cost of an employee benefit plan." *Metropolitan Life Insurance Co. v. State Board of Equalization*, 32 Cal. 3d 649, 186 Cal. Rptr. 578, 585 (1982). Thus, in calculating the tax imposed on excess-risk insurers, California includes not only the actual premiums received by insurers for their excess-risk policies, but also the amount of benefits paid by employers, from company assets, to plan beneficiaries. *Id.* at 584-85.[2] Consistent with state law, therefore, the California Board of Equalization and its members (the "Board") assessed a premium tax on Metropolitan, based on the premiums paid to it by GMC and Red Cross plus the actual bene-

[2] This construction is premised on the California Supreme Court's conclusions that employers who sponsor employee benefit plans are "mere agents" of insurers, and that the benefits that these agents pay to employees under such plans are in essence "premiums" paid to the insurer to satisfy employee claims.

fits paid to beneficiaries under the plans. Pursuant to the terms of their excess-risk policies, GMC and Red Cross, in turn, reimbursed Metropolitan for the total premium tax assessed.

THE PROCEEDINGS BELOW

GMC and Red Cross filed suit in the United States District Court for the Central District of California, claiming, *inter alia*, that California's taxation practice is preempted by ERISA. The district court agreed. Rejecting the Board's argument that the premium tax merely taxed the business of insurance, the court concluded that calculating "gross premiums" by reference to benefits paid under the plans represents an indirect tax on the benefits themselves. Thus, it concluded that "this taxation practice is preempted because it 'relates to' . . . the plans by using the plans' payments as a means for measuring taxable premiums." Appendix at 23a, *General Motors Corp. v. California Board of Equalization*, 600 F. Supp. 76, 80 (C.D. Cal. 1984), *amended*, 626 F. Supp. 439 (C.D. Cal. 1985).

The Ninth Circuit reversed. At the outset, the court agreed that the tax " 'relate[s] to' benefit plans . . . [because it] is computed on the basis of benefits paid by the plans." Appendix at 11a, *General Motors Corp. v. California Board of Equalization*, 815 F.2d 1305, 1309 (9th Cir. 1987). But, relying on this Court's decision in *Metropolitan Life Insurance Co. v. Massachusetts*, 471 U.S. 724 (1985) ("*Metropolitan Life*"), and the McCarran-Ferguson Act, 15 U.S.C. §§ 1011-1012, it concluded that ERISA's insurance saving clause—which exempts from preemption state laws that "regulat[e] insurance", ERISA § 514(b), 29 U.S.C. § 1144(b)—preserves the states' ability to tax insurance as well. Appendix at 13a, 815 F.2d at 1810. Finding that California's premium tax "is intimately associated with the business of insurance" and that the "incidence of the tax remains on the insurer, not the plans," the court held it to be saved

from ERISA's preemptive reach. *Id.* Turning to the "final step" in the preemption analysis, it then concluded that the tax "does not run afoul of the deemer clause [29 U.S.C. § 1144(b)(2)(B)] . . . [because] [i]t is imposed on insurance companies, not benefit plans." Appendix at 14a, 815 F.2d at 1311. Thus, the court concluded that ERISA did not preempt California's premium tax.

REASONS FOR GRANTING THE WRIT

1. The Court Below Decided An Important Issue Of Federal Law In A Manner Inconsistent With The Decisions Of This Court

ERISA's "deliberately expansive", *Pilot Life Insurance Co. v. Dedeaux*, 107 S.Ct. 1549, 1552 (1987), but elusively crafted, preemption clause once again raises an important issue for review by the Court: whether a state premium tax, which is nominally assessed against insurers but is calculated in part based on the level of benefits paid under the self-funded portion of an ERISA plan, escapes preemption as a law which "regulates insurance" within the meaning of ERISA's saving clause. The court below held that it does. In doing so, it "[e]levat[ed] the incidence of the tax [on the insurer] over [its] effects [on ERISA plans]"—reading *Metropolitan Life* to require such a result. Appendix at 14a, *General Motors Corp. v. California Board of Equalization*, 815 F.2d at 1310. This is a misapplication of ERISA, which should be reviewed by this Court.

ERISA's "virtually unique pre-emption provision," *Franchise Tax Board v. Construction Laborers Vacation Trust*, 463 U.S. 1, 24 n.26 (1983), "supersede[s] any and all State laws insofar as they may now or hereafter relate to any employee benefit plan. . . ." 29 U.S.C. § 1144(a). Giving "[t]he phrase 'relate to' . . . its broad common-sense meaning," this Court has stated "that a state law 'relate[s] to' a benefit plan 'in the normal sense of the phrase, if it has a connection with or reference to

such a plan.'" *Metropolitan Life*, 471 U.S. at 739, *quoting Shaw v. Delta Air Lines*, 463 U.S. 85, 97 (1983). Thus, "[ERISA's] pre-emption clause is not limited to 'state laws specifically designed to affect employee benefit plans,'" *Pilot Life Insurance Co. v. Dedeaux*, 107 S. Ct. at 1553, *quoting Shaw v. Delta Air Lines*, 463 U.S. at 98, because "even indirect state action . . . may encroach upon the area of exclusive federal concern." *Alesssi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504, 525 (1981); *see also Metropolitan Life*, 471 U.S. at 739.

California—with the endorsement of the court below—has indirectly, but seriously, encroached upon ERISA's exclusive domain. Plainly, if California had taxed directly a wholly self-insured employee benefit plan, in amounts that increased concurrently with the level of benefits it paid to beneficiaries, there would be no doubt that ERISA would preempt the State's action. *See, e.g., National Carriers' Conference Committee v. Heffernan*, 454 F. Supp. 914 (D. Conn. 1978) (state statute requiring plans to pay an annual tax based on the amounts of benefits paid held preempted by ERISA). Such a tax—no differently than the premium tax at issue here—would surely "relate to" an employee benefit plan.[3] The mere

[3] The clear words of ERISA and its legislative history permit no other result. Indeed, though specifically presented with a recommendation to exclude from preemption the states' authority to tax pension plans in 1974, Congress did not do so. *See* Administration Recommendations to the House and Senate Conferees on H.R. 2 to Provide for Pension Reform (April 1974), *reprinted in* 3 Legislative History of the Employee Retirement Income Security Act of 1974 ("Legislative History"), at 5050, 5145-47. Moreover, eight years later, when it created a narrow exception to ERISA's preemption clause for Hawaii's health care statute, Congress reaffirmed that ERISA preempts state tax laws. *See* 29 U.S.C. § 1144(b)(5)(B)(i) (Hawaii exemption "shall [not] be construed to exempt from [§ 514(a)] any State tax law relating to employee benefit plans"); *see also* 128 Cong. Rec. S13151 (daily ed. Oct. 1, 1982) (Senator Dole) ("Hawaii law . . . would not be preempted by ERISA to the extent that [it] does not relate to matters

fact that the "incidence" of California's premium tax rests on the plan's excess-risk insurer, rather than the plan itself, should not protect it from preemption as a law which "regulates insurance", particularly where the insurer bears no risk of paying, and receives no premiums for, the benefits subject to taxation. That such taxation is, in substance, a tax on an ERISA plan—and not, as its form might suggest, a tax on insurance—is starkly evident where, as here, the plan sponsors fund the taxed benefits with company assets, purchase insurance only to cover excess plan liabilities, and bear the entire risk of paying the uninsured benefits subject to the tax.

The contrary conclusion of the court below rests on its misinterpretation of *Metropolitan Life*. Nothing in *Metropolitan Life*, however, compels the court's elevation of form over substance. The Court in *Metropolitan Life* narrowly held that a state statute regulating the content of insurance policies was saved from preemption by ERISA as a law that "regulates insurance". But the Court did not hold, as the court below found, that "effects are not determinative" in ERISA preemption analysis. Appendix at 14a, 815 F.2d at 1311. Nor did it implicitly hold that ERISA's saving clause protects indirect state taxation of ERISA plans that self-insure all but excess plan liabilities. Review is thus necessary to correct the

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thoroughly regulated under ERISA or impose tax liability on insurance premiums or benefits"); 128 Cong. Rec. H9609 (daily ed. Dec. 13, 1982) (Representative Erlenborn) ("amendments . . . serve to reaffirm the broad Federal preemption of State laws as they relate to employee benefit plans as was the original intent of ERISA"). Congress did so again when, in 1984, it carved out an exception to § 514 for qualified state domestic relations orders. *See, e.g.*, H.R. Rep. No. 655, 98th Cong., 2d Sess., pt. 1, at 42 (1984) ("the original broad intent behind ERISA's rule of preemption . . . has always been to preempt state or local government laws or actions of any type which directly or indirectly relate to any employee benefit plan subject to ERISA. . . . [T]he Committee reasserts that a state tax levy on employee welfare benefit plans is preempted by ERISA").

Ninth Circuit's misapplication of *Metropolitan Life* and to "preclude [California] from avoiding through form the substance of [ERISA's] preemption provision." *Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. at 525.

2. The Decision Below Has A Far-Reaching And Impermissible Impact On Plan Funding Decisions

California's indirect taxation practice encroaches on ERISA's exclusive domain in yet another way: it undercuts employer discretion to fund employee welfare benefit plans "through the purchase of insurance or otherwise." 29 U.S.C. § 1002(1). Because the decision below effectively eliminates one method of plan funding—a combination of company assets and excess-risk insurance—and disrupts the uniform administration of benefit plans that ERISA was designed to foster, this Court should review it.

The decision below—that ERISA does not preempt a state premium tax assessed indirectly against the self-funded benefits of an ERISA plan simply because the plan purchases excess-risk insurance—greatly limits the funding choices available to employers who voluntarily establish ERISA plans. The practical effect of the decision below is to inflate, perhaps prohibitively, the cost of excess-risk insurance to plan sponsors and thus to discourage their reliance on innovative funding methods. By discouraging excess-risk insurance, the decision would leave plans vulnerable to catastrophic losses that may deplete plan assets substantially, if not entirely. California's practice thus penalizes creative compromises that might lower costs for both employers and insurers and might encourage the growth of benefit plans.

Such results are entirely at odds with the words and intent of ERISA. Because the decision below effectively eliminates a method of funding that ERISA permits, it intrudes on ERISA's exclusive domain. *Cf. Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. at 524 (New Jersey statute which prohibits offsetting pension ben-

efits with workers' compensation benefits held preempted by ERISA "because it eliminates one method for calculating pension benefits—integration—that is permitted by federal law" and that ERISA left subject to the discretion of pension plan sponsors). Indeed, if states, like California, are permitted to interfere with employer discretion by encouraging or discouraging certain funding methods, employers who operate—and insurers who provide insurance for—multi-state plans will be forced to conform to a patchwork of state-preferred funding methods or eliminate their plans altogether. But, as this Court stated in *Shaw v. Delta Air Lines, Inc.*, 463 U.S. at 105 and n.25, and recently reiterated in *Fort Halifax Packing Co. v. Coyne*, 107 S. Ct. 2211 (1987), subjecting employers with nationwide plans to the varied, and perhaps inconsistent, requirements of different states' laws:

> would produce considerable inefficiencies, which the employer might choose to offset by lowering benefit levels. . . . 'ERISA's comprehensive preemption of state law was meant to minimize this sort of interference with the administration of employee benefit plans,' . . . so that employers would not have to 'administer their plans differently in each State in which they have employees.'

Id. at 2217 (citation omitted). *Cf. Minnesota Chamber of Commerce and Industry v. Hatch*, No. Civil 4-87-707 (D. Minn. Oct. 29, 1987) ("If such ownership of [stop-loss] insurance were enough to prevent ERISA preemption, plan providers would be subject to a myriad of state regulation which would operate to frustrate ERISA's uniform treatment of benefit plans.").[4]

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[4] Any other conclusion would disregard Congress' explicit intent to provide for uniformity in the administration of ERISA plans:

> Except . . . in certain . . . enumerated circumstances, state law is preempted. Because of the interstate character of employee benefit plans, *the Committee believes it essential to provide for a uniform source of law in the areas of vesting, funding, insurance and portability standards*, for evaluating fiduciary con-

The impact of the decision below on employee benefit plan administration is thus potentially far-reaching. The disincentives spawned by California's taxing scheme seriously threaten the stability of multi-state employee benefit plans which rely in part on insurance funding or the administrative services of insurers.[5] It threatens reversal of a trend away from fully-insured plans to self-funded plans which rely on insurers only for excess liability coverage or administrative services. Indeed, while less than five percent of total insurance company group coverage in 1975 consisted of such innovative funding arrangements, like that at issue here, those arrangements represented an estimated 30 percent of the total insurance group coverage in 1981. *See* HIAA, Source Book of Health Insurance Data, 1982-1983, at 8. Moreover, that

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duct, and for creating a single reporting and disclosure system in lieu of burdensome multiple reports.

S. Rep. No. 127, 93d Cong., 1st Sess. 35 (1973), *reprinted in* 1 Legislative History, at 621 (emphasis added); *see also* 120 Cong. Rec. 29,197 (1974) (Representative Dent) (broad federal preemption was designed to eliminate "the threat of conflicting and inconsistent State and local regulations"); 120 Cong. Rec. 29,933 (Senator Williams) ("the substantive and enforcement provisions . . . are intended to preempt the field for Federal regulations, thus eliminating the threat of conflicting or inconsistent State and local regulation of employee benefit plans"); 120 Cong. Rec. 29,942 (1974) (Senator Javits) ("the emergence of a comprehensive and pervasive Federal interest and the interests of uniformity with respect to interstate plans required—but for certain exceptions—the displacement of State action in the field of private employee benefit programs").

[5] Because California taxes "the entire cost of an employee benefit plan," *Metropolitan Life Insurance Co. v. State Board of Equalization*, 32 Cal. 3d 649, 186 Cal. Rptr. 578, 585 (1982), even plans that purchase only the administrative services of an insurance company may be subject to the tax. Moreover, the effect of the decision below is only amplified by the fact that California's taxing practice is not unique. Indeed, Texas has recently enacted, and Michigan considered adopting, a similar practice. *See* 1987 Tex. Gen. Laws, 70th Leg., 2d C.S., Ch. 5, Art. 8, p. 57. That more states may follow suit in the wake of the decision below, is hardly unexpected.

trend has continued. A recent study reveals that over 80 percent of employees receiving employer-provided health care benefits in 1980 were covered by commercial insurance carrier and Blue Cross-Blue Shield policies. *See* United States Department of Labor, Bureau of Labor Statistics, "Employee Benefits in Medium and Large Firms," 1986 (June 1987), at 32 and Table 47. Such policies accounted for only one-half or less of health care coverage in 1986. *Id.*

Review of the decision below is thus vitally important. To deny review, and thereby leave intact state taxing practices like California's, would only create disuniformities in plan administration and discourage innovative funding methods—and thus the provision of welfare benefits to the nation's workers—in clear derogation of ERISA.

3. The Decision Below Presents An Opportunity To Clarify The Respective Roles Of ERISA's Saving And Deemer Clauses

Review is necessary for still another reason: the court below gave ERISA's saving clause an unduly broad reading, and construed the deemer clause too narrowly, when it held that a state premium tax calculated with reference to the level of benefits paid under the self-funded portion of an ERISA plan is not preempted by ERISA. The decision below neither comports with a "commonsense" interpretation of ERISA's insurance saving clause, read in light of *Metropolitan Life* and the McCarran-Ferguson Act, nor gives due consideration to ERISA's proscription against "deeming" plans to be engaged in the "business of insurance."

ERISA saves from preemption "any law of any State which *regulates insurance*." 29 U.S.C. § 1144(b)(2)(A) (emphasis added). "[T]he language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose," *Metropolitan Life*, 471 U.S. at 740, *quoting Park'n Fly, Inc. v. Dollar Park and Fly, Inc.*, 469 U.S. 189, 194 (1985), strongly suggest that ERISA saves from preemption only state regulation of insurance, and not, as the court below found, state taxation of the self-insured benefits of an ERISA plan.[6] That such state tax laws do not constitute insurance regulation draws support from *Metropolitan Life*. In that case, the Court—as it has in interpreting other words in ERISA—gave the phrase "regulates insurance" its practical and "commonsense" meaning. *Metropolitan Life*, 471 U.S. at 740. It

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[6] The McCarran-Ferguson Act, which provides in part that "[t]he business of insurance . . . shall be subject to the laws of the several States which relate to the *regulation or taxation* of such business," 15 U.S.C. § 1012(a) (emphasis added), was obviously in mind when Congress saved from ERISA preemption state laws that "regulat[e] insurance." *See Metropolitan Life*, 471 U.S. at 744 n.21. The omission from the saving clause of any reference to state laws which "tax" insurance is conspicuous when the language of the two clauses is carefully considered. Congress surely meant something different by the terms "regulation" and "taxation", as the words of the McCarran-Ferguson Act and its legislative history amply reflect. *See* H.R. Rep. No. 143, 79th Cong., 1st Sess. 2 (1945) (bill designed to address questions as to the "validity of State tax laws as well as State regulatory provisions"); 91 Cong. Rec. 480-81, 483 (Jan. 25, 1945) (Senators Ferguson and Radcliffe); *id.* at 485-86 (Senator Revercomb); *id.* at 487 (Senator Ellender). Whether Congress intended, when it omitted "taxation" from the saving clause, to leave ERISA's expansive preemption clause effective as to state taxation of the self-insured portion of a partially-insured ERISA plan warrants consideration by this Court.

thus concluded that Massachusetts' mandated-benefits law was saved from preemption as a law which "regulates insurance," noting that regulation of the content of insurance contracts—no differently than "regulation of the carrier [and] regulation of the sale and advertising of the insurance", *id.* at 728—is precisely the type of state insurance regulation that the McCarran-Ferguson Act preserves.[7]

Regulation of the substantive terms of insurance contracts, however, is distinctly different from the tax practice at issue here. Unlike the mandated-benefits law at issue in *Metropolitan Life*, the California tax involved here does not "regulate" the content of insurance contracts in California. Nor, given its substantive impact on ERISA plans, can the tax reasonably be found to "regulate" insurers and their transacting of insurance business within the State. To hold otherwise, and apply California's taxing practice to the self-funded portion of an employee benefit plan, would attribute to the phrase "regulates insurance" an overly broad meaning which makes little common sense.

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[7] Indeed, the Court in *Metropolitan Life* articulated its interpretation of "regulation" with clarity. To illustrate the types of state insurance regulation preserved by the McCarran-Ferguson Act, it explained (*id.* at 728 n.2) (citation omitted and emphasis added):

> Laws *regulating* the insurer include, for example, those governing solvency or the qualification of management. Laws *regulating* aspects of transacting the business of group insurance include, for example, those regulating claims practices or rates. Finally, laws *regulating* the content of group policies include, in addition to the mandated-benefit statutes under consideration here, those requiring the policies to provide grace periods and conversion privileges. . . . All three varieties of *regulation* are common.

See also SEC v. National Securities, Inc., 393 U.S. 453, 460 (1969) ("Congress was concerned [in the McCarran-Ferguson Act] with the type of state regulation that centers around the contract of insurance. . .").

That California's tax practice does not "regulat[e] insurance" also draws support from this Court's decisions under the McCarran-Ferguson Act. Specifically, this Court has articulated three criteria for determining whether a particular activity constitutes the "business of insurance" within the meaning of the McCarran-Ferguson Act: "*first*, whether the practice has the effect of transferring or spreading a policyholder's risk; *second*, whether the practice is an integral part of the policy relationship between the insurer and the insured; and *third*, whether the practice is limited to entities within the insurance industry." *Union Labor Life Insurance Co. v. Pireno*, 458 U.S. 119, 129 (1982). Applying these criteria to determine whether a state law "regulates insurance" within the meaning of ERISA's saving clause, as this Court did in *Metropolitan Life*, 471 U.S. at 742-44, and *Pilot Life Insurance Co. v. Dedeaux*, 107 S. Ct. at 1553-55, suggests that the tax practice at issue here is not saved from preemption. At a minimum, a state taxing practice which, though nominally an insurance law, taxes the self-insured benefits of an ERISA plan does not regulate the spreading or transferring of the policyholder's risk, which is the "one 'indispensable characteristic of insurance'." *Union Labor Life Ins. Co. v. Pireno*, 458 U.S. at 127, *quoting Group Life & Health Insurance Co. v. Royal Drug Co.*, 440 U.S. 205, 211-12 (1979).

Further, the court below read ERISA's "deemer" clause too restrictively when it concluded that California's indirect taxation of plan benefits did not "run afoul of the deemer clause." Appendix at 14a, 815 F.2d at 1311. That clause provides that "[no] employee benefit plan . . . shall be deemed to be an insurance company . . . or to be engaged in the business of insurance . . . for purposes of any law of any State *purporting* to regulate insurance companies. . . ." 29 U.S.C. § 1144(b)(2)(B) (emphasis added). Through its tax practice, California certainly "*purport*[*s*] to regulate insurance com-

panies." *Id.* But, in effect, it taxes the self-insured benefits of ERISA plans. Because it effectuates this taxation by treating plan sponsors as the excess-risk insurer's "agents"—though the plan itself bears *all* the risk of paying pre-trigger benefits—and by treating benefit payments to plan participants as insurance "premiums", California necessarily deems the plan to be engaged in the "business of insurance" in violation of ERISA's deemer clause.[8]

Only this Court can correct the misapplication of ERISA's saving and deemer clauses by the court below. Resolving the question whether these clauses, properly construed, protect from preemption indirect state taxation of the self-insured benefits of an ERISA plan is critically important to states, insurers and plan administrators alike. Review by this Court is required to avoid continued struggle—with numerous cases in the lower courts—over the proper interpretation of ERISA's preemption clauses and to preserve ERISA's primacy in the field of employee benefits.

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[8] The conclusion that the deemer clause precludes California's taxing practice draws support from the cases—including some within the Ninth Circuit—that have concluded that the deemer clause protects self-insured plans even if the plans purchase excess insurance. *See, e.g., United Food & Commercial Workers, et al. v. Pacyga*, 801 F.2d 1157, 1161-62 (9th Cir. 1986); *Moore v. Provident Life and Accident Insurance Co.*, 786 F.2d 922, 927 (9th Cir. 1986); *Minnesota Chamber of Commerce and Industry v. Hatch*, No. Civil 4-87-707 (D. Minn. Oct. 28, 1987). *But cf. Northern Group Services, Inc. v. Auto Owners Insurance Co.*, No. 86-1614 (6th Cir. Nov. 12, 1987) (holding self-insured plans to be subject to state "coordination of benefits" regulation, court concluded that the deemer clause overrides the saving clause only when there is "some ERISA interest in uniformity to outweigh the McCarran-Ferguson interest in state regulation of insurance").

CONCLUSION

For the reasons set forth above and for the additional reasons advanced in the Petition, the writ of certiorari should be granted.

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